PARTIAL-BIRTH ABORTIONS/Life-of-Mother and Health Exceptions

SUBJECT: **Partial-Birth Abortion Ban Act of 1995 . . . H.R. 1833. Boxer second-degree perfecting amendment No. 3083 to the Pryor amendment No. 3082.**

ACTION: AMENDMENT REJECTED, 47-51

SYNOPSIS: As introduced, H.R. 1833, the Partial-Birth Abortion Ban Act of 1995, will prohibit partial-birth abortions.

An affirmative defense will be provided if the physician reasonably believes a partial-birth abortion is necessary to save the life of the mother and no other procedure will suffice for that purpose. The term "partial-birth abortion" will be defined as an abo rtion "in which the person performing the abortion partially vaginally delivers the living fetus before killing the fetus and completing the delivery."

The Pryor amendment would amend current law to permit generic drug manufacturers to make drugs that have had their patents extended as a result of the Uruguay Round on the General Agreement on Tariffs and Trade (GATT) during those drugs' extension periods. Royalties would have to be paid to the patent holders.

The Boxer amendment would add that this bill's ban on partial-birth abortions "shall not apply to any abortion performed prior to the viability of the fetus, or after viability where, in the medical judgment of the attending physician, the abortion is necessary to preserve the life of the woman or avert serious adverse health consequences to the woman."

NOTE: By unanimous consent, the Boxer amendment was debated concurrently with a Dole/Smith second-degree amendment to a Smith amendment (see vote No. 592). After agreeing to the Dole/Smith and Smith amendments and after rejecting this amendment, the Senate amended the Pryor amendment (see vote No. 594). The Pryor amendment was then withdrawn.

Those favoring the amendment contended:

Our opposition to this bill is well known. However, if we are unable to stop it from passing, we should at least fix its constitutional defects. Twenty-two years ago the Supreme Court handed down the *Roe* v. *Wade* decision in which it said that the woman's interest

(See other side)

YEAS (47)

Republicans (9 or 17%)	Democrats (38 or 84%)	
Brown	Akaka	Kennedy
Campbell	Baucus	Kerrey
Chafee	Biden	Kerry
Cohen	Bingaman	Kohl
Jeffords	Boxer	Lautenberg
Kassebaum	Bradley	Leahy
Simpson	Bryan	Levin
Snowe	Bumpers	Lieberman
Specter	Byrd	Mikulski
	Daschle	Moseley-Braun
	Dodd	Murray
	Dorgan	Nunn
	Feingold	Pell
	Feinstein	Pryor
	Glenn	Robb
	Graham	Rockefeller
	Harkin	Sarbanes
	Hollings	Simon
	Inouye	Wellstone

NAYS (51)

Republicans (44 or 83%)		Democrats (7 or 16%)
Abraham	Helms	Breaux
Ashcroft	Hutchison	Conrad
Bennett	Inhofe	Exon
Bond	Kempthorne	Ford
Burns	Kyl	Heflin
Coats	Lott	Johnston
Cochran	Lugar	Reid
Coverdell	Mack	
Craig	McCain	
D'Amato	McConnell	
DeWine	Murkowski	
Dole	Nickles	
Domenici	Pressler	
Faircloth	Roth	
Frist	Santorum	
Gorton	Shelby	
Gramm	Smith	
Grams	Stevens	
Grassley	Thomas	
Gregg	Thompson	
Hatch	Thurmond	
Hatfield	Warner	

NOT VOTING (1)

Republicans (0)	Democrats (1)
	Moynihan-[2]

EXPLANATION OF ABSENCE:
1—Official Buisiness
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:
AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

and decisions in reproductive matters should remain paramount. It also said that States could ban abortion in the last trimester, but that they had to include exceptions for when the life and health of the mother was in danger. That decision has been reaffirmed time and time again. Over the years, 41 States have enacted laws to regulate third-trimester abortions, and those laws conform to the *Roe* v. *Wade* condition that they must have exceptions for the life and health of the mother. The Supreme Court, in its wisdom, understood that in rare, tragic, and compelling circumstances, women sometimes decide to have third trimester abortions in order to save their lives or to prevent drastic damage to their health. This bill, though, does not allow partial-birth abortions that are necessary to protect the health of the woman. For example, a woman who would become infertile if she did not have a partial-birth abortion would be denied the medical treatment she needs by this bill. The Boxer amendment would remedy this glaring defect, and therefore deserves our strong support.

Those opposing the amendment contended:

The Boxer amendment would permit an abortionist to perform a partial-birth abortion for any reason before viability, however he personally chose to define viability, and would allow a partial birth abortion right up through the ninth month of pregnancy for life-of-the-mother and "health" reasons, again as defined by the abortionist himself. This amendment would thus make this bill meaningless--no one who commits an illegal partial-birth abortion would ever admit that it was on a viable baby or that in his judgment it was not necessary to protect the woman's health. The supposed purpose of this amendment is to make this bill conform to the *Roe* v. *Wade* decision. However, no such change is necessary--this bill is constitutionally sound.

Partial-birth abortions are generally performed beginning at 20 weeks (4.5 months), which is right before viability, and they are legal through all nine months. "Viability" is usually understood to refer to the point at which a baby can survive independently of his or her mother with the assistance of neonatal intensive care. That point is presently at 23 weeks (5 months), and is moving lower with advances in technology. A 1991 study of seven neo-natal units by the National Institutes of Health found that the survival rate at 23 weeks was 23 percent, with one unit posting a 57-percent survival rate. The Boxer amendment, though, does not state that viability begins at 23 weeks, at 26 weeks, at 34 weeks, or ever--instead, it leaves it up to the abortionist to state when viability begins. It also explicitly states that partial-birth abortions can be performed for any reason before viability. Dr. Haskell, the one living person who admits to using this procedure (the only other admitted partial-birth abortionist, Dr. McMahon, recently died), routinely performs them on request from 20 weeks to 24 weeks. To date, he has personally performed more than 1,000 such abortions. On November 8 of this year, Dr. Haskell testified in a Federal court that 24-week babies should not be presumed viable, because "fetal viability outside the womb at 23 to 24 weeks is about 3 percent." This statement is demonstrably false, yet under the Boxer amendment Dr. Haskell's medically false statement would have to be accepted legally. A Kansas doctor who also performs third-trimester abortions has publicly defined "viability" to mean the point at which an infant can survive "without artificial life supports" which is 34 weeks or later. Under that extreme definition, those people who are born and live out long and productive lives dependent on life support systems are never "viable." Under the Boxer amendment, though, this doctor's definition of viability would be legally unchallengeable.

The Boxer amendment's proponents were not content with eviscerating this bill with their language on viability. They also added a provision saying that a partial-birth abortion would be legal if, in the judgment of the attending physician, it were necessary to "preserve the life of the woman or avert serious adverse health consequences to the woman." In the Doe v. Bolton case (the companion case to the *Roe* v. *Wade* case) the Supreme Court defined "health" in the abortion context to include "all factors--physical, emotional, psychological, familial, and the woman's age--relevant to the well-being of the patient." Using these "health" factors, an abortionist could legally perform partial-birth abortions right through the ninth month of pregnancy simply by asserting that they were necessary for such reasons as relieving "depression." This statement is not hypothetical--the late Dr. McMahon, who admittedly performed partial-birth abortions through the ninth month of pregnancy, voluntarily submitted a list of 175 such abortions which he said were done for maternal health reasons. From this self-selected list, nearly one-quarter were performed for "depression."

As for our colleagues' constitutional argument, it is clear that this bill does not violate the *Roe* v. *Wade* decision (or the *Planned Parenthood* v. *Casey* decision which eliminated the *Roe* v. *Wade*'s trimester framework). Although State laws on homicide and infanticide generally protect only fully born children, at least 36 States allow recovery under wrongful death statutes for postviability prenatal injuries that cause stillbirth, and another one-third consider killing an unborn child, other than through abortion, as a form of homicide. Further, some States, such as California and Texas, have passed specific laws to protect children in the process of being born. Other testimony and evidence presented in the Judiciary Committee, including from doctors who perform abortions, is that this procedure is far out of the mainstream of medical practice and is in fact dangerous for the woman. Banning this one particularly brutal method of abortion would simply force doctors who perform third-trimester abortions to conform to standard medical practice, which is hardly an undue, constitutional burden.

In summary, the Boxer amendment would make this bill meaningless. It is not constitutionally necessary, and banning only those partial-birth abortions which the people who are committing them say are illegal would not do anything to stop this brutal practice. It may give some Senators political cover who privately do not want to make these abortions illegal but who publicly do not dare condone such an evil procedure, but it will certainly not have any other effect.